

**OPINION
56-24**

March 9, 1956 (OPINION)

CITIES

RE: Electors - Petitions

We have received your request for an opinion dated March 8, 1956, with reference to a petition recently filed with your city auditor asking for an election to change the form of city government from commission to the aldermanic system.

Your specific questions are as follows:

1. What constitutes an elector and how shall the auditor determine if the petition contains the necessary number of legal signers?
2. What voters' register shall the auditor examine in order to ascertain whether the petition is signed by the required number of electors?
3. Is it necessary that the petition show the age and length of residence in the city of each signer?

Section 40-0408 of the 1943 Code provides as follows:

CHANGE FROM COMMISSION SYSTEM OF GOVERNMENT; PETITION REQUIRED. Any city which shall have operated for more than six years under the city commission system of government may change its organization thereunder and adopt the city council form of government. The proceeding to change shall be initiated by a petition asking for such change signed by not less than forty percent of the electors of the city. The signatures to such petition need not be appended to a single paper, but one of the signers upon each paper shall make oath before an officer competent to administer oaths that each signature appearing upon such paper is the genuine signature of the person whose name it purports to be. Each petition, in addition to the names of the signers, shall contain the name of the street upon and the number of the house in which each petitioner resides, his age, and the length of his residence in the city. Any petitioner shall be permitted to withdraw his name from a petition within five days after the petition is filed."

Section 40-0409 of the 1943 Code provides as follows:

CITY AUDITOR TO PASS ON SUFFICIENCY OF PETITION TO CHANGE FROM COMMISSION SYSTEM OF GOVERNMENT. Within ten days after a petition to change from the commission system of government is filed, the city auditor shall examine the petition and ascertain from the voters' register whether or not the petition is signed by the required number of signers. He shall attach to the petition his certificate showing the result of his

examination, and if he finds the petition to be insufficient his certificate shall show the reason for such determination. An insufficient petition may be amended within ten days after the auditor's certificate is made. Within ten days after an amended petition is filed, the auditor shall make an examination thereof, and if his certificate shows such amended petition to be insufficient it shall be returned to the person filing the same without prejudice to the filing of a new petition to be sufficient, he shall place the same, with his certificate, before the governing body of the municipality."

In the case of State ex rel. Alexander v. Evenson reported in 255 N.W. on page 98 our supreme court held as follows:

A petition for an election to vote upon the question whether a city operating under the commission form of government shall abandon its organization under the commission system and return to the aldermanic system of city government must be signed by not less than forty percent of the electors of the city at the time the petition is presented."

The court, in effect, said the forty percent of signatures is not based upon the number of votes cast at any previous election but is based upon the number of electors in the city at the time the petition is filed. In this case it was sought by mandamus to compel the city auditor to certify as sufficient a petition for a special election on the question of abandoning the commission system of government and return to the aldermanic form of city government. The facts disclosed that the register for the last city general election held in 1930 contained the names of 7,487 electors and the voters' register for the 1932 general election contained the names of 9,152 electors in the city. The petition contained the names of over forty percent of the number of electors registered in the 1930 citywide election, but fell short of forty percent of the electors registered in the 1932 general election. The court said that while there was no showing of the actual number of electors in the city at the time the petition was filed, it was certainly more likely that the 1932 register was more nearly correct than the 1930 register for the general municipal election. The court held that the city auditor was justified in refusing to certify that a sufficient petition had been filed.

As to what constitutes an elector, it is our opinion that any person who possesses the necessary qualifications to vote in a city election in the city where the proposed change is contemplated would be an elector and qualified to sign the petition requesting an election to change from commission to aldermanic form of government. At the present time the latest registry of voters would be that of the general election held in November, 1954.

In answer to your question number two, it is our opinion that the latest register of voters is the one that the auditor should examine in order to determine the legal sufficiency of the petition.

In answer to your third question, we refer you to the case of State ex rel. Gran v. Bratsburg, et al reported in 210 N.W. 4, where the court held that although a statute provides that a petition shall

show the age of the petitioner and his length of residence in the city, failure to show either age or residence is not a fatal defect because these requirements are for the purpose of facilitating the identification of the signers and failure to include the age and residence of the signer of a petition is not a jurisdictional defect. We realize that this case deals with petitions for recall of city officials and not with a change from commission to aldermanic form of government, but since the language of the petition statutes for both of these purposes are almost identical and the same general principles of law are involved, we believe the holding in the above-cited case is applicable to the instant problem.

LESLIE R. BURGUM

Attorney General